been judicially declared to be either; and, until that has been done, the application of such epithets to him is unjust, as tending to prejudice his case in the public estimation.

In the conclusion of his article, the writer wants to know how long it will be before Judge Goff will allow J. L. Gleaves to prosecute Mr. Wadley?

The recent spring elections in Wythe county put it altogether out of Judge Goff's power, if he were so disposed, to allow J. L. Gleaves to prosecute anybody.

But, as to what Judge Goff will eventually do in the Wadley case, we dare say that when the occasion shall arise for him to act, he will do that which it befits a judge to do.

Newbern, Va. J. C. WYSOR.

DEMURRERS TO EVIDENCE.

Heretofore it has been considered by the profession that the Court of Appeals is our court of last resort, whose decision of a legal question puts it beyond controversy, and whose merest *dictum* must be accepted by bench and bar as presumptive evidence of correct legal doctrine. But the establishment of the LAW REGISTER has changed all this by giving the bar at least the privilege of grumbling (or "protesting," if we must use its legal synonym), and the delightful chance of having the last word, even at the court.

It is proposed to take advantage of this opportunity by briefly reviewing a recent decision of the Court of Appeals, which must have startled those to whose attention it has been brought.

Allusion is made to the case of *Richmond & Danville Railroad Company v. Scott*, decided December 21, 1894, and reported in 20 S. E. Rep. 826. It is as follows:

"FAUNTLEROY, J. This is a writ of error to the judgment of the Circuit Court of Albemarle county, rendered on the 14th day of May, 1892, in an action of trespass on the case for damages, in said court pending, in which W. C. Scott, Jr., is plaintiff, and the Richmond & Danville Railroad Company is defendant. After the evidence was all heard, the defendant demurred thereto, and the jury assessed the plaintiff's damages at $2,500, subject to the judgment of the court upon the demurrer, and entered judgment for the plaintiff according to the verdict, and for costs. The case is here upon a writ of error, which was awarded by one of the judges of this court.

"The record shows that there was not a motion addressed to the court for a new trial; and under the ruling of this court in the case of *Newberry v. Williams*, 89 Va. 298 (15 S. E. Rep. 865), and the cases therein cited, the omission of a motion to set the verdict aside and for a new trial, puts it out the power of this court to review the proceedings had in the case in the trial court. The writ of error must therefore be dismissed, as having been improvidently awarded, and the judgment of the Circuit Court of Albemarle affirmed."

This decision professes to decide that before reviewing a judgment of a lower court overruling a demurrer to evidence, a motion to set aside the verdict and for a new trial must be made; and to sustain the proposition the case of *Newberry v. Williams* is cited.

But *Newberry v. Williams* was not the case of a demurrer to evidence at all. It was an ordinary motion to set aside an ordinary verdict in an ordinary case, submitted unconditionally to a jury for its decision. The loser brought the case to the appellate court without making a motion for a new trial, and thereby giving the trial judge an opportunity of correcting any errors which he may have made during its progress. On this account a motion for a new trial has been considered necessary in jury trials.

But this principle has no application to cases rested on demurrer to evidence. In such cases the jury brings in no verdict at all, in the proper sense of the word. The court passes upon every question of law and fact, subject to certain rules, and the jury merely assesses the damages. It is in name and in fact a conditional verdict. The counsel argues no question before the jury except the amount of damages, the court gives no instructions except on that one point. Hence, while a motion to set aside such a verdict on the ground of excessive damages would, of course, be in order, it would be ridiculous to move its annulment as contrary to the law and evidence; for the jury has not passed upon the evidence, and has not been instructed as to the law. The argument of counsel, both on law and fact, is addressed to the court, the final decision is by the court, which can take all the time it wishes in entering its judgment. Hence, the court has full opportunity, not merely to correct errors, but, better still, to guard against them; and a motion for a new trial is no more necessary than it would be in a chancery case.

If such a motion is necessary, it must be on the theory that the trial court should grant it, either voluntarily or in obedience to a mandate from the appellate court. How would this work out? We will suppose that in the case of *Jones v. Smith* the jury has brought in a verdict to the following effect: "We, the jury, assess the plaintiff's

damages at $3,000, subject to the opinion of the court on demurrer to evidence." (This, though not the old form of verdict, has of late years become a common one.) As a motion to set aside the verdict must be made before judgment is entered, it must be made here if at all. And yet, no one at this stage knows what the judgment may be. *Non constat* but that it may be for defendant! Let us suppose, however, that a motion is then made and granted. What is the consequence? Instead of a summary disposition of the case, which has heretofore been the object of a demurrer to evidence, the same thing must be gone over at a succeeding term, the same verdict must be found (for a verdict assessing damages is a matter of course), the same motion again made, and so *ad infinitum*.

If that is the law, such a thing as a final judgment in a case tried on demurrer to evidence is a legal impossibility, and yet the procedure has heretofore been taken with that as its main object.

Until the jury has brought in its conditional verdict, there is no trial; for the trial takes place afterwards before the court; and hence this decision practically announces the novel doctrine that there must be a motion for a new trial before there has been any trial!

An examination of the record in the case does not tend to add to the force of the opinion, for it shows that the bill of exceptions was substantially in the form usual in cases of demurrer to evidence.

But, what is more remarkable, an examination of the briefs filed discloses no argument on the point at all. They were devoted to a discussion of the case on the merits, and the only allusion to this question is a citation of the case of *Newberry v. Williams*, in the closing line of appellee's brief, accompanied by no comment.

The decision contravenes the practice of centuries; and, being a mere question of procedure, and not a rule giving rise to vested rights, it may safely be assumed that it will be disregarded by the new court.

Norfolk, Va. ROBT. M. HUGHES.

THE ACTION OF EJECTMENT IN VIRGINIA.

The history of our action of ejectment is one of the most curious in the annals of jurisprudence. It is more than four hundred years old, and during all that period the courts and Parliament of England and the legislatures of our States have been working upon it, seeking to make it more simple and effective. It has been rendered reasonably